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in the

UNITED STATES SUPREME COURT

October Term, 1940

No. 245

THE UNITED STATES OF AMERICA, *Appellant,*

VS.

J. W. GILLILAND, RALPH GILLILAND, FRED A. WILLIAMS, ET AL, *Appellees.*

BRIEF FOR THE APPELLEES

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BRIEF FOR THE APPELLEES

The District Court concluded that no count of the indictment states an offense under the provisions of section 35 of the Criminal Code. (Sec. 80, Tit. 18, U. S. C.). Certain expressions of the court, appearing in his opinion, are made the basis of the errors assigned by the government, because, it is asserted, the views of the court, as evidenced by these expressions as to the meaning and intent of this statute, limit its scope to such an extent that the very purpose of the statute as amended June 18, 1934, is destroyed. As we see it, the reasons given for the conclusion that was reached,

are entirely immaterial. The question here is: Is the conclusion, that the indictment does not show that the defendants committed any acts that are prohibited by this statute, a correct conclusion? While we agree with the reasoning of the court in arriving at this conclusion, nevertheless the conclusion of the court is the only conclusion that could have been reached, under the facts alleged, whatever views may have been taken of the scope and effect of this statute. Indeed, if the court had gone so far as to adopt the interpretation contended for by the Government, that is, that the wording of the statute should be construed in conformity with what is said in the Report of the Senate Judiciary Committee, that the purpose of amending the statute is to reach a large number of cases involving the shipment of "hot" oil where false papers are presented in connection therewith, still the indictment would not state an offense under this statute. This is because there is not a single averment in the entire indictment that the defendants were engaged in the shipment of "hot" oil, or that the false affidavits, that they are charged in the first count with having conspired to make and use, and the false affidavits, that they are charged in the remaining counts, to have made and used, were to be presented, and were presented to the Federal Tender Board in connection with the shipment of "hot" oil.

If it were the intention of Congress by the amendatory Act to make criminal the use of false papers in

connection with the shipment of "hot" oil, in a charge for its violation, would it not be necessary in order to bring the case within that intention, to at least allege, in the conspiracy count, that the defendants conspired that they would present false papers in connection with the shipment of "hot" oil, and in the counts charging commission of that offense, that they presented false papers in connection with the shipment of "hot" oil? The answer seems obvious. We take it, therefore, that it follows, that the Government's contention, that the District Court erred in not sustaining the indictment under the view that the 1934 amendment was enacted for the specific purpose of making criminal the presentation of false papers in connection with the shipment of "hot" oil, is wholly untenable.

Now let us see what the other contentions are. As we understand counsel, they complain of the District Court holding that the general words employed in the 1934 amendment are restricted in their meaning to include and bring within their scope only acts that are of the same class and kindred to the acts that are enumerated in the statute. They do not make clear what, if any, restriction should be placed upon them, therefore we take it that it is their position that these general words should be given their literal meaning; and anyone who makes a false affidavit, statement or representation about anything that is within the jurisdiction of any department or agency of the United

States or any corporation in which the United States is a stockholder, has offended against this Act.

Counsel further contend that Regulation Number Fourteen, set out in their brief, issued by the President under the provisions of the Connally Act, (Sec. 715, Tit. 15, U. S. C.), required all oil producers in the East Texas field to make monthly reports as to their production to the Federal Tender Board; that this gave the Board jurisdiction to require such reports; that when the defendants conspired that they would make false affidavits that would relate to and cover the reports that were to be made to the Federal Tender Board by the Gilliland Refining Company, as is alleged in the first count, they conspired to make false affidavits about a matter within the jurisdiction of a governmental agency, and therefore such conspiracy was a conspiracy to violate Section 35. Likewise, it is asserted, that when the defendants made and caused to be made the false affidavits that are attached to and made a part of the reports set forth in the remaining counts, they made and caused to be made false affidavits in relation to matters, (the reports), within the jurisdiction of a governmental agency, and consequently they again offended against the provisions of Section 35. Let us see now if these contentions are sound.

Section 35 as amended by the Act of 1934, contains seven clauses. It might be convenient to the court for us to set it out by clauses, numbering them in their

order and italicizing the words that were added by the amendment. It is as follows:

(1) "Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claims to be false, fictitious, or fraudulent;

(2) "Or whoever shall knowingly and wilfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, *in any matter within the jurisdiction of any department or agency of the United States or any corporation in which the United States of America is a stockholder;*

(3) "Or whoever shall take and carry away, or take for his own use, or for the use of another, with intent to steal or purloin, *or shall wilfully injure or commit any depredations against,* any property of the United States, or any branch or department thereof, or any corporation in which the United States of America is a stockholder, *or any property which has been or is being made, manufactured, or constructed under contract for the War or Navy Departments of the United States;*

(4) "Or whoever shall enter into any agreement, combination, or conspiracy to defraud the government of the United States or any department or officer thereof, or any corporation in which the United States of America is a stockholder, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim;

(5) "And whoever having charge, possession, custody, or control of any money or other public property used or to be used in the military or naval service, with intent to defraud the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, or wilfully to conceal such money or other property shall deliver or cause to be delivered to any person having authority to receive the same any amount of such money or other property less than that for which he received a certificate or took a receipt;

(6) "Or whoever being authorized make or deliver any certificate, voucher, receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing, or other property so used or to be used, shall make or deliver the same to any other person without a full knowledge of the truth of the facts stated therein and with intent to defraud the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, shall be fined not more than $10,000, or imprisoned not more than 10 years, or both.

(7) "And whoever shall purchase or receive in pledge, from any person any arms, equipment, ammunition, clothing, military stores, or other property furnished by the United States, under a

clothing allowance or otherwise, to any soldier, sailor, officer, cadet, or midshipman in the military or naval service of the United States or the National Guard or Naval Militia, or to any person accompanying, serving, or retained with the land or naval forces and subject to military or naval law, having knowledge or reason to believe that the property has been taken from the possession of the United States or furnished by the United States under such allowance, shall be fined not more than $500, or imprisoned not more than two years, or both."

It is at once apparent that the acts charged do not come within the scope of the first, third, fourth, fifth, sixth, and seventh clauses, for these clauses deal with enumerated and specific acts that are not of the same class or kindred as the acts charged in the indictment. Therefore, these questions present themselves:

(1). Did not the Congress intend that the general terms employed in the second clause should relate to the things that are enumerated in the context of the Act and that this clause should be for the purpose of gathering up the things of the same class and kindred as those that are enumerated?

(2). Did Congress intend that the second clause should be lifted out of the statute, so to speak, and be made to stand alone, creating a multitude of new offenses that are entirely dissociated and distinct from the offenses enumerated in the context of the Act? Would it, so treated, be valid as a penal statute?

(3) Assuming that by the 1934 amendment Congress intended to prohibit the presentation and

use of false papers in connection with the shipment of "hot" oil, was not that part of the Act repealed by implication when Congress enacted what is known as the Connally Act, section 715, Title 15, U.S.C.A., which is a self-sustained and organic whole, equipped to effectuate the declared policy of Congress, covering in detail the entire subject of the shipment of "hot" or excessively produced oil in interstate commerce?

(4) Do the facts that are averred in the indictment show: (a) that the false affidavits which the defendants conspired to make and use and those that they made and used were in relation to a matter or subject within the jurisdiction of the Department of the Interior, Secretary of the Interior, and the Federal Tender Board; or, (b) that such false affidavits were to be made and used and were made and used in connection with the shipment of "hot" oil in interstate commerce?

(5) In a charge for having violated the provisions of the second clause of Section 35, is not the intent and purpose of the defendants to accomplish a purpose that this clause contemplates and prohibits, an ingredient of the offense; and should not that intent and purpose be averred in the indictment to support a conviction of an offense under its provisions?

(6) Is not Regulation Number Fourteen invalid because the President failed to make any finding that reports as to production of oil required by it, was necessary and appropriate to the enforcement of the Connally Act?

With the indulgence of the court, we now desire to give it our idea about these questions.

ARGUMENT UPON FIRST QUESTION

Did not Congress intend that the general terms employed in the second clause should relate to the things that are enumerated in the context of the Act and that this clause should be for the purpose of gathering up the things of the same class and kindred as those that are enumerated?

Section 35 of the Criminal Code was formerly section 5438 of the Revised Statutes, having been taken from an act approved March 2nd, 1863, entitled "An Act to Prevent and Punish Frauds Upon the Government of the United States." 12 Stat. 696. This section, after being once amended, 35 Stat. 555, was, upon the codification of the penal laws, adopted as section 35 of the Criminal Code. 35 Stat. 1088. Since then, it has been twice amended, first, by the Act of October 23rd, 1918, 40 Stat. 1041, and by the Act of June 18th, 1934. 48 Stat. 996. Prior to the 1934 amendment, the statute prohibited only the cheating and swindling the United States of its money and property. United States vs. Cohen, 270 U. S. 339, 70 L. Ed. 616; United States ex rel Starr vs. Mulligan, 59 Fed. (2) 200.

In construing a statute, in order to arrive at the intent of the Legislature, it is of course a well recognized rule that we must look to the circumstances prevailing and the existing evils that it was the purpose of the Legislature to suppress. It is manifest from the original Act, and its amendments, that the purpose of

Congress was to suppress the evil of cheating and swindling the government of its money and property. In 1918, the United States was at war, and in order to more effectively prosecute the war, the Fleet Corporation and other corporations were created as instrumentalities of the United States. By the creation of these corporations, a new avenue was opened to cheat and swindle the government with impunity by the simple process of cheating and swindling these corporations, as cheating and swindling corporations owned by the United States was not made an offense. Salas vs. United States, 234 Fed. (C.C.A.) 842. Therefore, it was to deal with this evil that Congress enacted the 1918 amendment to the statute for the protection of the government against this class of evildoers. United States vs. Bowman, 260 U. S. 92, 67 L. Ed. 149.

In 1934, the whole country was again in distress due to an economic depression. The Federal Government sought to relieve it by spending money, consequently its activities assumed greater proportions than ever before in our history. Various corporations were formed and administrative agencies established, such as the Reconstruction Finance Corporation, Home Owners Loan Corporation, Agricultural Adjustment Administration, Federal Housing Administration, Public Works Administration, Works Progress Administration, and so on ad infinitum. These corporations and agencies were all instrumentalities of the United States and were spending billions of dollars. It is a matter of common

knowledge that these vast sums of money were turned over to the borrowers and public beneficiaries upon showings made that they were entitled to the same under the acts of Congress and the rules and regulations made governing the expenditure of such money. These showings were necessarily made by representations, statements, affidavits, depositions, etc.; and in cases of public works where the Federal Government participated with the state or municipalities in the cost of such work, the payrolls, vouchers, and other evidences of expenditures were required as a basis for the Federal contribution. Under the Federal Housing Administration program, banks over the country would make loans to those who owned a lot and desired to build a house. The repayment of this loan would be guaranteed by the United States. Therefore, the borrower must make, through his bank, an application to the housing administration officials setting out all the facts as to the value of his lot, the cost of the house to be erected, etc. Upon this application, the housing administration official either approved or disapproved the loan. The approval carried with it the guarantee of the United States, and the bank then proceeded to make the loan. Therefore, it is not difficult to perceive of the very many new avenues that were thus opened through which the United States could be cheated and defrauded by the making and using of false statements, affidavits, payrolls, vouchers, etc., in connection with these matters; and injury to the United States could thus be worked without committing any of the

acts prohibited by the statute. So it was to meet and deal with this situation that the 1934 amendment became necessary.

To accomplish this, Congress reenacted section 35 in its entirety, with the exception of eliminating one clause, the subjects of which were dealt with in another clause which is retained, and added the three clauses which we have hereinabove pointed out. That Congress intended to broaden the statute so as to deal with those acts which worked injury to the United States that were not contemplated when the statute was amended in 1918, there can be no doubt. That is manifest by the two clauses that were added, which prohibit the wilful injury to any governmental property and the injury or commission of depredations against any property in the course of manufacture for the War and Navy Departments. The third clause added is that which, with the words of the old statute, constitutes the second clause of the present statute as we have hereinabove set it out; and, as we have seen, this clause is general and prohibits no specific or definite act, unless it is construed in connection with the subjects dealt with in the context of the statute. Giving it that effect, then the prohibitions contained in it refer to and deal with the subjects of cheating and swindling the government and the intent then becomes clear, for it empowers the government to more effectively deal with those subjects. Let us see if our conclusion in this respect is not correct.

In the 1918 amendment, the language used by Congress was general and prohibited the filing of false claims for payment or approval against any corporation in which the United States is a stockholder. Giving it a literal interpretation, a multitude of new offenses were created, for the filing of a false claim against any corporation in which the United States might own stock would be an offense against this statute. However, the Supreme Court held, in effect, that Congress by the use of this general language had no such intention; that it intended only to deal more effectively with the subjects dealt with in the statute, that is, cheating, defrauding, and swindling the United States, and, therefore, Congress intended that the language employed should be used in a limited sense and prohibit cheating and swindling of only those corporations like the Fleet Corporation that were instrumentalities of the government. United States vs. Walter, 263 U. S. 15, 68 L. Ed. 137.

When Congress enacted the 1934 amendment, it unquestionably intended that the general terms used by it should be constructed to apply only to the subjects of the statute, inasmuch as the general terms used in the 1918 amendment had been given that application. Mobile Trade Company vs. Lott, 12 Wall. 221, 20 L. Ed. 376; Greenleaf vs. Goodrich, 101 U. S. 278, 25 L. Ed. 845; Sewing Machine Company case, 18 Wall. 553, 21 L. Ed. 914. It can hardly be contended that Congress intended by the 1934 amendment to create a mul-

titude of new offenses entirely dissociated from the subjects dealt with in the statute that was amended.

In United States vs. Keitel, 211 U. S. 370, 33 L. Ed. 230, the court had before it an amendment to the pension statute. The statute, before amendment, prohibited the filing of false affidavits, statements, and representations with the pension commissioner. The amendatory statute, in repeating the original words, namely: "concerning any claim for pension or payment thereof, or pertaining to any other matter within the jurisdiction of the commissioner of pensions", adds to them the following, namely: "or of the Secretary of the Interior". It was contended by the United States that the statute, after the amendment, embraced not only acts done in connection with pensions or bounty land claims, but all acts of the prohibited character as to any matter coming before the Secretary of the Interior. On this question, the court said:

> "But to adopt this construction would cause the statute to create a multitude of new and substantive crimes wholly disconnected with claims for pension or bounty land, with which latter it was alone evidently the purpose of the original, as well as the amendatory statute, to deal. We think to state the proposition is, in effect, to answer it. When the original text and the amendments which were made are taken into view, the conclusion inevitably follows that the purpose of amendment was but to more specifically define the pension or bounty land papers, etc., with which the statute was concerned, and to enlarge the operation of the

statute in respect to such papers so as to cause it to be criminal to use the pension or bounty land papers, etc., to which the statute refers, as well before the Secretary of the Interior as before the commissioner of pensions. In other words, that the only purpose of the amendment was to more fully deal with the subjects with which the provision which was amended dealt, and not by way of amendment to legislature concerning every conceivable subject coming within the jurisdiction of the Secretary of the Interior. * * * Indeed, if the purpose intended to be accomplished by the amendment had been to embrace all acts of the prohibited nature as to every subject within the jurisdiction of the Secretary of the Interior, no reason can be suggested why the new legislation should have taken the form of mere amendment to the section of the statute which was alone concerned with pension and bounty land claims."

The statute under consideration is not unlike the statute involved in the case of United States vs. Salen, 235 U. S. 236, 59 L. Ed. 210. In that case, the government, as in the case at bar, sought to create new offenses by a general clause of the statute, which, if given such an interpretation, would create offenses wholly dissociated from those enumerated in the statute. Upon this contention the court said:

"Such an interpretation would give an exceedingly liberal construction to a statute defining a felony. It would ignore the fact that the meaning of words is affected by their context, and violate the settled rule that words, which, standing alone, might have a wide and comprehensive import, will, when joined with those defining specific acts, be

interpreted in their narrower sense, and understood to refer to the things of the same nature as those described in the associated list, enumeration, or class. Virginia vs. Tennessee, 148 U. S. 519, 37 L. Ed. 543; United States vs. Chase, 135 U. S. 253, 34 L. Ed. 118; Neal vs. Clark (Neal vs. Scruggs), 95 U. S. 708, 24 L. Ed. 587."

ARGUMENT UPON SECOND QUESTION

Did Congress intend that the second clause should be lifted out of the statute, so to speak, and be made to stand alone, creating a multitude of new offenses that are entirely dissociated and distinct from the offenses enumerated in the Act? Would it, so treated, be valid as a penal statute?

Before entering upon our discussion, let us revert to the principles of the construction of penal statutes, as announced by this court, from the very beginning of our government to the present time.

In United States vs. Wiltberger, 5 Wheat. 76, 5 L. Ed. 37, Chief Justice Marshall said:

> "The principle that a case which is within the reason or mischief of a statute is within its provisions cannot be carried so far as to punish a crime not enumerated in the statute."

In United States vs. Brewer, 139 U. S. 278, 35 L. Ed. 190, it is said:

> "Laws which create crime ought to be so explicit that all men subject to their penalties may

know what acts it is their duty to avoid. United States vs. Sharpe, Pet. C. C. 118. Before a man can be punished, his case must be plainly and unmistakably within the statute. United States vs. Lacher, 134 U. S. 624."

In United States vs. Resnick, 299 U. S. 207, 91 L. Ed. 127, it is said:

"Statutes creating crimes are to be strictly construed in favor of the accused; they may not be held to extend to cases not covered by the words used. United States vs. Wiltberger, 5 Wheat. 76, 5 L. Ed. 37; Fasolo vs. United States, 272 U. S. 620, 71 L. Ed. 443."

Therefore, with these principles in mind, let us examine the clause under consideration to see whether it is sufficiently definite and certain to inform one that he is violating its provisions if he makes and uses a false affidavit that relates to and covers a report, made by another, to the Federal Tender Board, a governmental agency, as to the amount of oil that he produced from his oil leases. For convenience, we here repeat this clause.

"Or whoever shall knowingly and wilfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, in any matter within

the jurisdiction of any department or agency of the United States or any corporation in which the United States of America is a stockholder;"

Now it is clear that such acts are not enumerated in this clause. Therefore, the question arises: Is the language used sufficiently definite and certain to inform one committing those acts that he is offending against its provisions? It will be seen that the prohibition is against the *making or using* of false affidavits in relation to a matter within the jurisdiction of a governmental department or agency, or corporation in which the United States is a stockholder. Under what circumstances and intent and purpose is the making of such false affidavit prohibited? Congress has not said. How or in what manner is its use prohibited? Congress has not said. What matters are or are not within the jurisdiction of the governmental departments and agencies and the corporations in which the United States is a stockholder? Congress has not said. Certainly the mere making of an affidavit that is false, although it be in relation to a matter within the jurisdiction of some department or agency of the United States, or some corporation in which it is a stockholder, with no intention to in any wise injure the United States, and with no intention to accomplish some purpose that the law prohibited, could not be an offense. Certainly, every use of a false affidavit that relates to a matter within the jurisdiction of some governmental department or agency or corporation in which the United

States is a stockholder, could not be criminal; yet there is no definition of the use so that one would be put on notice that to use such an affidavit in the manner defined would be a violation of the law.

The false affidavit, to come within the operation of the language of this clause, must be in relation to a matter within the jurisdiction of some governmental department or agency, or corporation in which the United States is a stockholder. The term "jurisdiction" is not a commonly understood word. Judges and lawyers understand the word to mean the power lawfully conferred upon one to declare the law. Webster's Dictionary defines "jurisdiction" as, first, the legal power, right, or authority to hear and determine a cause or causes. Second, authority of a sovereign power to govern or legislate; control. Third, sphere of authority. We take it that Congress, in employing that term, intended the latter definition. Nevertheless, what is and what is not within the sphere of authority of the governmental departments and agencies, and corporations in which the United States is a stockholder, is not so generally known and understood that one making an affidavit about a matter would know beforehand that he would incur the penalties of the law if the affidavit was false. This clause, standing alone as a statute creating new offenses that are distinct from and unrelated to those enumerated in the context of the statute, of which it is a part, is entirely too indefinite and uncertain, because there is no fixing by Congress of any ascertainable standard of guilt.

The questions of whether a matter about which a false affidavit had been made is, or is not, within the jurisdiction of a governmental department or agency, or corporation in which the United States owns stock, and whether such affidavit was used in an unlawful manner, are left open to the widest conceivable inquiry, and upon these questions different courts would most assuredly differ. An accused may be held for his act in one court and discharged in another. Such statutes have uniformly been condemned and held void. United States vs. Cohen Grocery Company, 255 U. S. 81, 65 L. Ed. 516.

In Connally vs. General Construction Company, 269 U. S. 385, 70 L. Ed. 322, it is said:

> "The terms of a penal statute creating new offenses must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties. It is a well recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law, and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law. International Harvester Company vs. Kentucky, 234 U. S. 216, 58 L. Ed. 1284; Collins vs. Kentucky, 234 U. S. 634, 58 L. Ed. 1510. * * * "

The court continued, quoting with approval what was said in United States vs. Capital Traction Company, 34 App. D. C. 592:

" 'The dividing line between what is lawful and unlawful cannot be left to conjecture. A citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. A crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another.' "

If Congress intended to create a multitude of new offenses by making it an offense for anyone to make or use a false affidavit about any matter within the jurisdiction of any department or agency of the government, or any corporation in which the United States is a stockholder, in doing so it would not attempt to create such offenses by the mere adding of a few words of general import to a statute that dealt only with cheating and defrauding the government of its money and the theft and destruction of its property. United States vs. Keitel, 211 U. S. 370, 53 L. Ed. 280.

ARGUMENT UPON THIRD QUESTION

Assuming that by the 1934 amendment Congress intended to prohibit the presentation and use of false papers in connection with the shipment of "hot" oil,

was not that part of the Act repealed by implication when Congress later enacted what is known as the Connally Act, section 715, Title 15, U. S. C. A., which is a self-sustained and organic whole, equipped to effectuate the declared policy of Congress, covering in detail the entire subject of the shipment of "hot" or excessively produced oil in interstate commerce?

It will be seen that the statute under consideration was amended on June 18, 1934. At that time, the National Recovery Act was being enforced. Section 9 (c) of that Act authorized the President to prohibit the shipment of oil produced in excess of the state law into interstate commerce. Acting under that purported authority, the President issued a proclamation prohibiting the shipment of excessively produced oil in interstate commerce, and designated the Secretary of the Interior as his nominee to make rules and regulations for the enforcement of his proclamation. On August 2nd, 1933, the Secretary issued a number of regulations on the subject, and among them is regulation 6, which provides as follows:

> "No transporting agency, either by rail, pipe line, water, motor vehicle, or any other means of conveyance, shall receive for transportation any petroleum or products thereof, unless the respective shippers and producers hereinafter described shall each furnish and the transporting agency or agencies shall receive in good faith and without reasonable grounds for believing that any fact stated is untrue, affidavits sworn to before any duly authorized state or federal officer, setting

forth the information required by this regulation for the respective shippers or producers."

Then follow the rules and classifications covering the furnishing of affidavits under this regulation, they being Class A, Class B, and Class C shipment. It is a matter of history that many false affidavits were made and furnished to the transporting agencies under the provisions of this regulation, in order to ship in interstate commerce excess or "hot" oil and the products thereof. Thus the supposed will of Congress, manifested through the proclamation of the President and the regulations of the Secretary of the Interior, was being circumvented and rendered ineffectual. So the Secretary, as the Government's brief shows, recommended that Congress enact some legislation to deal criminally with those culprits who evaded his orders in this fashion.

Whether the Senate Committee amendment dealing with the presentation of false papers in connection with the shipment of "hot" oil failed of enactment, or the Committee deemed that the general language used by it in connection with the words used in the old statute that now make up the second clause had the effect of dealing with that evil, seems now to be immaterial, for the Act of Congress, which the clause under consideration was intended as an aider to its enforcement, was declared unconstitutional and void by the Supreme Court in Panama Refining Company vs. Ryan, 293 U. S. 388, 79 L. Ed. 446, and it would seem that when that Act failed, the clause under

consideration, insofar as it was intended to aid in the enforcement of that Act, would become inoperative and of no further force and effect.

But however that may be, the clause under consideration, insofar as Congress may have intended it to deal with the shipment of "hot" oil in interstate commerce, was repealed by implication when Congress later, in February of 1935, enacted what is known as the Connally Act, section 715, Title 15, U. S. C. A., for the latter act embraces the entire subject of the transportation of excessively produced oil in interstate commerce and deals with it in all of its phases.

In United States vs. Neal Powers, 83 L. Ed. 792, the court, in discussing this Act. says:

> "This is an Act designed to protect interstate and foreign commerce from the diversion and obstruction of, and the burden and harmful effect upon, such commerce caused by contraband oil, (as defined in the Act) and to encourage the conservation of deposits of crude oil within the United States. Administrative machinery is provided for the control of shipment or transportation of contraband oil in interstate commerce. * * * Penalties are provided for violations of the Act or any regulations prescribed thereunder. Secs. 6 & 7. And Section 10 implements the Act with civil and criminal procedures to enforce its sanctions. The Act is thus a self-sustained and organic whole, equipped to effectuate a declared policy of Congress."

In Cook County National Bank vs. United States, 107 U. S. 445, 27 L. Ed. 537, it is said:

> "A law embracing an entire subject, dealing with it in all of its phases, may thus withdraw a subject from the operation of a general law as effectively as though, as to such subject, the general law were in terms repealed. The question is one respecting the intent of the Legislature, and, although as a general rule, the United States are not bound by the provisions of a law in which they are not expressly mentioned, yet if a particular statute is clearly designed to prescribe the only rules which should govern the subject to which it relates, it will repeal any former one as to that subject. Daviess vs. Fairbairn, 3 How. 836; United States vs. Tynen, 11 Wall. 88."

In United States vs. Yuginovich, 256 U. S. 450, the court said:

> "It is, of course, settled that repeals by implication are not favored . It is equally well settled that a later statute repeals former ones when clearly inconsistent with the early enactments. United States vs. Tynen, 11 Wall. 88. In construing penal statutes, it is the rule that later enactments repeal former ones practically covering the same acts but fixing a lesser penalty."

In this connection, it will be noted that the maximum punishment for the violation of the statute under consideration is 10 years imprisonment and $10,000. fine, while the maximum punishment for the violation of the Connally Act is 6 months in jail and $2,000. fine. There-

fore, the Connally Act is clearly inconsistent with the Act under consideration under which the indictment is brought.

In United State vs. Windham, 264 Fed. 376, it is said:

> "The general rule for the construction of statutes is that, when a later statute is enacted inconsistent with preceding statutes and covering the entire ground of the subject matter, it supersedes and impliedly repeals the preceding statute. Especially is this the case when the later statute imposes penalties of less severity for the same offenses; the rule in favor of clemency being that, where different penalties are imposed for the same offense, the lighter penalty when imposed in a later statute is presumed to supersede the earlier and heavier penalty."

In State vs. Tate, 171 Southern 108, the Supreme Court of Louisiana said:

> "While it is true that repeals by implication are not favored, it is equally true that, where the obvious purpose of the law is to cover the whole subject matter therein dealt with, it supersedes all prior pertinent legislation."

Many other decisions from other jurisdictions are to the same effect. United States vs. 1 Chevrolet Coupe, 9 Fed. Sup. 85; State vs. Dixie Finance Co. (Tenn.), 278 S. W. 59; Gay vs. Commonwealth (Ky.), 21 S. W. (2) 480; Russel vs. State (Miss.), 169 So. 654; State vs. Coblentz (Md.), 175 Atl. 34; Norton Johnson Buick Co. vs. Lindley (Okla.), 46 Pac. (2) 525; Varney vs.

City of Albuquerque (N.M.), 55 Pac. (2) 40. In the last cited case it is said:

> "A statute enacted for the primary purpose of dealing with a particular subject prescribing terms and conditions covering the subject-matter supersedes a general statute which does not refer to that subject although broad enough to cover it. This rule of construction is so well established that we content ourselves with citing a few of the cases at hand. Gardner v. School District, 34 Okl. 716, 126 P. 1018; Ulster County vs. State, 177 N. Y. 189, 69 N. E. 370; People ex rel, Fore vs. Mo. Pac. Ry. Co., 342 Ill. 226, 173 N. E. 816; Daniels v. State, 150 Ind. 348, 50 N. E. 74; City of Marshall vs. State Bank of Marshall, 60 Tex. Civ. App. 508, 127 S. W. 1083; Thomas v. Evans, 73 Ohio St. 140, 76 N. E. 862; Gilkeson v. Mo. Pac. Ry. Co., 222 Mo. 173, 121 S. W. 138, 24 L.R.A. (N.S.) 844, 17 Ann. Cas. 763; Townsend v. Little et al, 109 U. S. 504, 3 S. Ct. 357, 27 L. Ed. 1012; Carolina-Tennessee Power Co. v. Hiawassee River Power Co., 171 N. C. 248, 88 S. E. 349."

Counsel on page 32 of their brief say that if one makes and files with the Federal Tender Board a false affidavit as to the monthly production of his oil, as required by Regulation Number Fourteen of Executive Order Number 6980-B, promulgated on March 1, 1935, under section 5 of the Connally Act, he incurs the penalty provided in that Act for its violation or the violation of the regulations issued thereunder, the maximum of which is six months in jail and two thousand dollars fine. Counsel say that one so offending may also be proceeded against for the same act under sec-

tion 35, the maximum penalty of which is ten years in the penitentiary and ten thousand dollars fine. They say that the great disparity in the penalty of the two statutes for the same offense is no indication whatsoever that Congress intended when it enacted the Connally Act to make the penalty provided for therein to cover all violations under its provisions and regulations, but the penalties provided in the Connally Act are no more than a "cumulative or auxiliary" sanction. If counsel are correct, we then have the same offense created and punished by two distinct enactments, and at the election of the prosecuting officer the offender may receive as punishment not more than six months in jail and two thousand dollars fine, or ten years in the penitentiary and ten thousand dollars fine. This court in the case of U. S. vs. Stever, 222 U. S. 157, L. Ed. 145, had something to say about such a contention by the Government. There, it was contended that the act committed by the defendant was made criminal under two separate statutes, and the District Attorney could at his election proceed under either enactment. Upon this contention this court said:

> "If, then, this indictment is also maintainable under sec. 3894, it must be because we are forced to conclude that Congress, when it revised the statutes, intended to make the use of the mails to effectuate a scheme to defraud, indictable and punishable under either of two distinct provisions, and that the District Attorney might elect as to which he would proceed under. Such a supposition is not to be lightly adopted. To so conclude would

result in the anomaly of an offense created and punished by two distinct enactments. Under the one, the accused may be proceeded against in a district where he could not be prosecuted under the other. The procedure under one differs in some important particulars from that admissable under the other, and the accused is subject to a measure of punishment under one not possible under the other. Thus, under sec. 3894, and indictment will lie in the district in which the defendant caused the letter to be delivered by the mail to the person addressed. That is not the case under sec. 5480. Under sec. 3894, one may be imprisoned not longer than one year, while under the other, he may be imprisoned for 18 months. Under sec. 3894, he is subject to indictment for any number of violations. Under the other, the indictment may only charge offenses to the number of three committed within the same six calendar months. No such purpose can be fairly said to have actuated Congress. The two sections are intended to prevent the use of the mail for certain purposes. The one applies to the use of the mail for the purpose of promoting lotteries, or other like schemes of chance. The other is intended to prohibit the use of the mail to carry on schemes of general fraud, the language being, 'any scheme or artifice to defraud.' A scheme to defraud by means of false pretenses is, as we have seen, a 'scheme or artifice to defraud', within the plain meaning and purpose of this section. The general words, 'on concerning schemes devised for the purpose of obtaining money or property under false pretenses', found in sec. 3894, do not harmonize with the general purpose of that section, if construed as urged by the learned Attorney General. So construed,

they would trench upon the ground covered by sec. 5480. The words referred to follow particular words descriptive of schemes of gain dependent upon chance and are followed by further particular words relating to the same kind of lottery schemes. *In such circumstances, unless there is a clear manifestation to the contrary, general words, not specific or limited, should be construed as applicable to cases or matters of like kind with those described by the particular words.* * * * (Italics ours.) Construing the two sections together as legislation in pari materia, we find no manifest legislative intent forbidding the application of the rule of construction referred to. We therefore conclude that the words, 'or concerning schemes devised for the purpose of obtaining money or property by false pretenses', are to be limited to schemes having a similitude to the lottery and other like schemes particularly described by the particular words of the section. This view finds strong support in the case of United States vs. Sauer, 88 Fed. 249, where the opinion was by Judge Severns, then District Judge."

Therefore, the conclusion must be that although Congress may have intended, by the 1934 amendment of the statute under consideration, to deal with the subject of presentation of false papers in connection with the interstate shipment of "hot" or excessively produced oil, that statute, insofar as it dealt with that subject, was repealed by implication by the later enactment of the Connally Act.

ARGUMENT UPON FOURTH QUESTION

Do the facts that are averred in the indictment show: (a) that the false affidavits which the defendants conspired to make and use and those that they made and used were in relation to a matter or subject within the jurisdiction of the Department of the Interior, Secretary of the Interior, and the Federal Tender Board; or, (b) that such false affidavits were to be made and used and were made and used in connection with the shipment of "hot" oil in interstate commerce?

To answer this question, we need but refer to the facts averred in the various counts. Of course, there are many assertions contained in them that the affidavits which the defendants conspired to make and those that they did make were about a matter within the jurisdiction of the Department of the Interior, the Secretary of the Interior, and the Federal Tender Board, but those statetments are merely conclusions of the pleader and cannot be taken into consideration in testing an indictment. The facts averred, and they only, can be taken into consideration. Now, then, what are the facts?

In the first count, it is alleged that the defendants conspired to make and use false affidavits that would *relate to and cover* certain reports that were to be made to the Federal Tender Board by the Gilliland Refining Company, neither it nor any of its officers being de-

fendants nor charged with any wrongdoing. The reports that the Gilliland Refining Company was to make to the Federal Tender Board are, first, Federal Form "D", Monthly Producer's Report, second, Federal Form "C", Monthly Pipe Line and Storage Report, and; third, Federal Form "A", Monthly Refinery and Reclamation Plant Report. It is not alleged that the reports were ever actually made by the Gilliland Refining Company to the Federal Tender Board, nor is it alleged what the false affidavits would contain relating to and covering said reports; nor is it alleged what said affidavits were to contain about matters within the jurisdiction of the Department of the Interior, the Secretary of the Interior, and the Federal Tender Board, and in what respect the affidavits were to be false regarding the jurisdictional subjects of these governmental agencies. Therefore, the effect and only effect of the facts plead in the first count is that the Gilliland Refining Company was to make certain reports to the Federal Tender Board about its production of oil, the amount of oil that it transported through its pipe lines and stored, and the amount of oil that it used in its refining operations; and that the defendants conspired that they would make false affidavits that would relate to and cover such reports.

There are no allegations that the reports that the Gilliland Refining Company was to make to the Federal Tender Board, and about which reports, it is charged, the defendants conspired to make the false affidavits,

were to be made or used by the Gilliland Refining Company, or the defendants, or anyone else, as a basis for, or in support of, or in connection with, any application to the Federal Tender Board for a certificate of clearance to ship the oil or products, the subject of the reports, in interstate commerce. Therefore, it follows that as to the first count, the facts averred wholly fail to state a case of conspiracy to make and use false affidavits about a matter within the jurisdiction of a governmental department or agency, or the presentation or use of false papers in connection with the shipment of "hot" oil in interstate commerce.

In the second count, it is averred that the defendants made and caused to be made, and used and caused to be used, the following affidavit:

"STATE OF TEXAS)
COUNTY OF GREGG)

Before me, the undersigned authority, on this day personally appeared F. Jones, known to me to be the person whose name is subscribed to this instrument, who, after being by me duly sworn, on oath, that he is the person in charge of superintending the production on all wells on the above property and is employed in the capacity of agent, and that said report contains no mis-statement or inaccuracy within the knowledge of the affiant; and that no pertinent matter inquired about in said report and within the knowledge of said affiant has been omitted from said report; and that

said report is a correct statement of the facts therein recited.

(Signed) F. JONES

Sworn to and subscribed before me, this 20th day of April, 1935.

(Signed) E. P. WILLIAMS
Notary Public, Gregg
County, Texas

It is averred that the defendants made and caused to be made, used and caused to be used, and delivered to the Federal Tender Board, a report in writing designated as Federal Form "D", Monthly Producer's Report of the United States Department of the Interior, Petroleum Administration, in the name of Oil, Inc., purporting to show the amount of petroleum oil produced during the month of March, 1935, from the oil wells located on the A. J. Sanders Lease, Upshur County, Texas; that said report was false in that there were produced from the wells upon the A. J. Sanders Lease, during the month of March, 1935, a greater quantity of oil than shown in the report. That the foregoing affidavit, which the defendants are charged with having made and caused to be made, was attached to and formed a part of said report.

Therefore, the sum and substance of all the facts averred in the second count is this and only this: That the defendants made and caused to be made a report to the Federal Tender Board in the name of Oil, Inc., as to the amount of oil produced during the month of March, 1935, from the A. J. Sanders Lease; that the

report was false because it did not contain the number of barrels actually produced; that the affidavit which the defendants caused Frank Jones to make, as hereinabove set out, was attached to said report. Therefore, the report being false, the affidavit was false.

The defendants are not charged with making a false report as to the amount of oil produced, but with making a false affidavit, which was attached to the report. There are no averments of fact which show that the affidavit is in relation to any matter within the jurisdiction of the department of the Interior, Secretary of the Interior, or the Federal Tender Board. Indeed, such a showing could not be made, because the facts alleged show that the affidavit, at most, related to nothing other than the amount of oil that was produced by Oil, Inc., from the A. J. Sanders Lease during the month of March, 1935. There is no allegation that the report was made or used as a basis or support for an application to the Federal Tender Board for a certificate of clearance to ship the oil described in the report in interstate commerce, or that the same was made and used, or intended to be used, in any connection whatsoever with the transportation of "hot" oil, or any other kind of oil, in interstate commerce.

Therefore, the facts averred in the second count wholly fail to state a case of making and using a false affidavit in relation to a matter within the jurisdiction of a governmental department or agency; and, likewise, the facts wholly fail to state a case of presenting

or using false papers in connection with the shipment of "hot" oil in interstate commerce.

The averments of fact in the remaining counts of the indictment are, in substance, the same as those of the second count, except that they cover different periods of time, and some of the affidavits are signed by other defendants. It is clear, therefore, that the facts in each and all of the counts of the indictment are insufficient to constitute the offense of conspiring to make and use, and making and using, false affidavits in relation to matters within the jurisdiction of a department or agency of the United States; and, likewise, the facts are insufficient to constitute the offense of making, presenting, and using false papers in connection with the shipment of "hot", or excessively produced, oil in interstate commerce.

ARGUMENT UPON FIFTH QUESTION

In the charge for having violated the provisions of the second clause of Section 35, is not the intent and purpose of the defendants to accomplish a purpose that this clause contemplates and prohibits, an ingredient of the offense; and should not that intent and purpose be averred in the indictment to support a conviction of an offense under its provisions?

An indictment in the words of the statute, where the statute defines all of the elements and ingredients of the crime, is sufficient; but where the statute consists

of generic terms, the acts, circumstances, and intent of the defendant must be sufficiently averred in the indictment to show that a crime was committed against such statute. The clause under consideration here is in generic terms. It prohibits the making or using of false affidavits in relation to a matter within the jurisdiction of governmental agencies, departments, or corporations in which the United States is a stockholder. Certainly the making of an affidavit that is false, and is in relation to a matter within the jurisdiction of such departments or agencies, would not, under all circumstances, be criminal; nor would every use of such affidavit constitute an offense. In order to constitute a crime the making and using of such false affidavit must be accompanied by an intent to accomplish an unlawful or forbidden purpose. Therefore, if the intent and purpose of making and using such a false affidavit is an ingredient of the crime, that intent and purpose must not only be alleged, but proven. If it is necessary that the intent and purpose be proven to support a conviction, it is certain that it must be alleged in the indictment, for every element that must be proven to support a conviction, must be charged.

In United States vs. Post, 113 Fed. 852, it is said:

> "The well established principle of criminal pleading which requires direct, positive, and affirmative allegations of every point necessary to be proven, is too well established to require extended consideration. Nothing in a criminal case can be charged by implication, intendment, or recital; but

every fact necessary to constitute the crime must be directly and affirmatively alleged."

In Brenner vs. United States, 287 Fed. (C.C.A.) 636, it is said:

"The indictment must charge the offense in more than the generic terms as in the definition. It must descend to particulars. United States vs. Cruikshank, 92 U. S. 542, 23 L. Ed. 588. A crime, unless otherwise provided by statute, is made up of acts and intent, and they must be set forth in the indictment with reasonable particularity as to time, place, and circumstances. Such particulars are matters of substance and not of form, and their omission is not aided or cured by a verdict. In United States vs. Hess, 124 U. S. 483, 31 L. Ed. 516, it is said: 'The essential requirements, indeed, all the particulars constituting the offense of devising a scheme to defraud, are wanting. Such particulars are matters of substance and not of form, and their omission is not aided or cured by the verdict.'"

ARGUMENT UPON SIXTH QUESTION

Is not Regulation Number Fourteen invalid because the President failed to make any finding that reports as to production of oil required by it, was necessary and appropriate to the enforcement of the Connally Act?

The Government contends that Regulation Number Fourteen, promulgated by the President under the authority of Section 5 of the Connally Act, requires each producer in the East Texas oil field, although he

is not carrying on his business in interstate commerce, to file monthly reports as to his production of oil with the Federal Tender Board. It is asserted that this Regulation confers jurisdiction upon the Federal Tender Board to require such reports, and that when the defendants conspired that they would make false affidavits that would relate to and cover the reports that were to be filed by the Gilliland Refining Company they conspired to make false affidavits about a matter within the jurisdiction of an agency of the United States; and, likewise, when they made or caused to be made affidavits which were attached to and made a part of the reports which were false and filed with the Federal Tender Board, as set out in the remaining counts of the indictment, they made and caused to be made false affidavits about matters within the jurisdiction of an agency of the United States. Consequently, it is asserted that the acts of the defendants come within the condemnation of Section 35. Counsel also assert that the defendants may also be proceeded against criminally under the provisions of the Connally Act for having filed false reports in violation of Regulation Number Fourteen.

If Regulation Number Fourteen is valid, there is no doubt but that one who files a false report as to his oil production is liable under the provisions of the Connally Act. Section 5 of that Act authorizes the President, if he finds it necessary or appropriate for the enforcement of the provisions of said Act, to issue regu-

latiqns requiring reports as to production, storage, refining, transporting, etc., although those activities are no part of interstate transportation of petroleum and its products, which Congress has seen fit to regulate. Congress, having entered the field of prohibiting the interstate transportation of oil produced in excess of state authority, of course has the power to authorize the President, as to its delegate, to regulate, by regulations, activities that are wholly intrastate, if he finds as a fact that the regulation of such intrastate activities are necessary and appropriate to the enforcement of the interstate prohibition. But Congress clearly and plainly enjoined upon the President the duty of first finding, as a condition precedent, that it is necessary and appropriaate to the enforcement of its interdiction, that reports as to production, etc., be furnished, before he subjects those who are engaged wholly in intrastate activities to the operation of the Act. But the President, in issuing this Regulation, failed to make any finding whatsoever that reports as to production, refining, etc., are necessary and appropriate to the enforcement of the Act. Therefore, the Regulation is absolutely void, and any reports that the defendants may have filed with the Federal Tender Board under its requirements are of no consequence, and any false statement or representation that the defendants may have made concerning such reports could not be in relation to a matter within its jurisdiction.

In Panama Refining Company vs. Ryan, 293 U. S. 388, 79 L. Ed. 446, it is said:

> "If the citizen is to be punished for the crime of violating a legislative order of an executive officer, or of a board or commission, due process of law requires that it shall appear that the order is within the authority of the officer, board or commission, and, if that authority depends on determinations of fact, those determinations must be shown."

There is only one other question in this case; that is the action of the District Court in holding that the first count of the indictment contains sufficient averments to charge the defendants with having conspired to transport excessively produced oil in interstate commerce in violation of the Connally Act. We are doubtful whether this court will entertain our complaint as to the act of the court in this respect, but since the defendants will be subjected to prosecution under the first count, even though this court sustains the judgment of the District Court in otherwise dismissing the indictment, we thought it would be best to call this court's attention to our motion for a new trial in this regard, and our exception to the court's action in denying our motion, not being sure but that this court, having the whole case before it, may review the act of the District Court in this respect. And, if this court does review the act of the lower court in holding that the first count is sufficient to state the offense of conspiracy to transport excessively produced oil in inter-

state commerce, then, in that event, we invite the court's attention to the allegations of the first count, which clearly show that the lower court has fallen into error in holding that count good in that respect.

We think the District Court fell into error in reaching this conclusion, because it inadvertently overlooked the absence of averments showing that the defendants agreed to produce oil in excess of the amounts permitted by the laws of Texas and the rules and regulations of the Railroad Commission made thereunder, and that they agreed to transport the same, or the products thereof, in interstate commerce, which is essential to the stating of an offense under the Connally Act. But before taking this up, let us refer to the Connally Act and see what contraband oil is and what is prohibited from interstate commerce. The pertinent provisions of this statute are as follows:

"Sec. 715a.

(1) The term 'contraband oil' means petroleum which, or any constituent part of which, was produced, transported, or withdrawn from storage in excess of the amounts permitted to be produced, transported, or withdrawn from storage under the laws of a state or under any regulation or order prescribed thereunder by any board, commission, officer, or other duly authorized agency of such state, or any of the products of such petroleum."

"Sec. 715b. Interstate transportation of contraband oil forbidden.

The shipment or transportation in interstate commerce, from any state, of contraband oil, pro-

duced in such state, is hereby prohibited. For the purposes of this section, contraband oil shall not be deemed to have been produced in a state if none of the petroleum constituting such contraband oil, or from which it was produced or derived, was produced, transported, or withdrawn from storage in excess of the amounts permitted to be produced, transported, or withdrawn from storage under the laws of such state, or under any regulation or order prescribed thereunder by any board, commission, officer, or other duly authorized agency of such state."

Now it is seen that the Act does not prohibit the interstate transportation of all "contraband oil". There are four commodities defined as "contraband oil", namely: (1) petroleum that has been produced in excess of the state authority; (2) petroleum that has been transported in excess of the state authority; (3) petroleum that has been withdrawn from storage in excess of the state authority; (4) the products of petroleum produced or transported or withdrawn from storage in excess of the state authority. But the prohibition against interstate shipment applies to only that petroleum, or its products, that has been produced in excess of the state authority. Therefore, for the first count of the indictment to be sufficient to charge the defendants with the offense of having conspired to transport into interstate commerce contraband oil in violation of the Connally Act, it is obvious that the averments must show that the defendants conspired and agreed that they would transport from the State of Texas into interstate commerce, petroleum or its

products which was produced in Texas in excess of the laws of Texas, or the regulations or orders prescribed thereunder by the Railroad Commission of Texas, which is the agency authorized by the laws of Texas to fix production quotas.

This, we say, is not shown by the averments. Let us see if we are not correct. Omitting the formal allegations and the names of the defendants, it is averred that the defendants "did, to-wit, continuously from on or about March 1, 1935, up to on or about January 1, 1938, unlawfully, knowingly, fraudulently, wilfully, and feloniously agree, combine, confederate, and conspire among themselves and with each other to commit divers and sundry offenses against the laws of the United States of America, to-wit:". The pleader then particularizes and states what the defendants agreed to do: "To knowingly, wilfully, unlawfully, and feloniously make and cause to be made, use and cause to be used, false affidavits relating to matters within the jurisdiction of the Department of the Interior, the Secretary of the Interior, and the Federal Tender Board No. 1, Kilgore, Texas, knowing the same to contain fraudulent and fictitious statements, the said Department of the Interior, and the said Secretary of the Interior, and the said Federal Tender Board No. 1, Kilgore, Texas, then and there being each of them a governmental department and agency of the United States."

The remaining averments of the count are but recitals descriptive of the details of the conspiracy to make and use false affidavits in relation to matters within the jurisdiction of the Department of the Interior, the Secretary of the Interior and the Federal Tender Board, and cannot be considered as a charge.

But if they may be so considered, let us see what these averments contain. We quote:

> "The Grand Jurors further present that a more definite description of the unlawful agreement and conspiracy to commit said offenses in violation of the laws of the United States is as follows: That certain of said defendants would produce and cause to be produced oil from certain leases, hereinafter described, situated in Gregg and Upshur Counties, Texas, and within the jurisdiction of this court, which oil would be produced in violation of the laws of Texas, and the rules and regulations of the Railroad Commission of Texas, and in excess of the amounts of oil permitted to be produced from the wells on said leases. Certain others of said defendants were to, without lawful authority and without approved tenders or permits of the Railroad Commission of Texas, or Federal Tender Board No. 1, Kilgore, Texas, transport the said unlawfully produced oil from the said leases to the Gilliland Refining Company at Gladewater, Gregg County, Texas, or cause the same to be done; and certain others of said defendants were to refine said unlawfully produced oil so transported, and manufacture it into contraband products at said Gilliland Refinery in the City of Gladewater, Texas, or cause the same to be done. Certain others of said defendants were to sell, ship,

and deliver into interstate commerce, the said contraband products so manufactured, and cause the same to be done without lawful authority and in violation of the laws of the United States."

The remaining averments are that the defendants would make false affidavits in relation to matters within the jurisdiction of the Department of the Interior, the Secretary of the Interior, and Federal Tender Board No. 1, Kilgore, Texas, which would relate to certain designated reports as to the production of oil, the transportation of oil, and refining operations, which reports were to be made to the Federal Tender Board by the Gilliland Refining Company. But it is clear, these averments merely amplify the averments immediately following the charge and explaining it, namely, that the defendants conspired that they would make and use false affidavits in relation to matters within the jurisdiction of these governmental agencies. As the court has held these averments state no offense, they will not be considered further, and we will confine our discussion to those averments which we have just quoted, wherein the allegations pertain to the agreement to produce, transport, and refine unlawful oil and ship the products thereof in interstate commerce.

As we see it, if it had been directly charged that the defendants conspired to commit the acts set forth in the averments which we have quoted, still no offense would be stated. Why? Because it is nowhere averred that the defendants agreed that they would produce petroleum in excess of the amounts permitted to be

produced by the laws of Texas, or the regulations or orders of the Railroad Commission, prescribed thereunder, and transport such petroleum or the products thereof, in interstate commerce. The averment is that some of the defendants would produce oil "in violation of the laws of Texas and the rules and regulations of the Railroad Commission of Texas, and in excess of the amounts of oil permitted to be produced from the wells on said leases". This is not an averment of any facts, but a mere conclusion of the pleader, and ought to be disregarded.

But assuming that this statement may be considered as a statement of fact, and taken as a charge, the charge then is: "That the defendants agreed that they would produce oil in violation of the laws of Texas and the rules and regulations of the Railroad Commission of Texas, and in excess of the amounts of oil permitted to be produced from the wells on said leases." It is at once apparent that this does not charge the defendants with having agreed to produce contraband oil, as defined by the statute, simply because it is not averred that the oil, which they agreed to produce, would be in excess of the amounts permitted to be produced by the laws of Texas, or the rules and regulations of the Railroad Commission prescribed thereunder.

It is merely alleged that they agreed to produce oil in violation of the laws of Texas and the rules and regulations of the Railroad Commission; but it does not follow from this that, in producing oil in violation of

the laws of Texas and the rules and regulations of the Railroad Commission, that the production would be in excess of such laws and regulations; nor does it follow from the statement that the oil was to be produced in excess of that permitted to be produced from the wells on said leases, that the defendants agreed to produce amounts of oil from said wells in excess of that allocated to them by the regulations of the Railroad Commission, acting under the laws of Texas. How and in what manner the production was to be in violation of the laws of Texas and the rules and regulations of the Railroad Commission is not shown, nor is it shown how or in what manner the production, which the defendants agreed upon, would be in excess of that permitted to be produced from the wells on said leases, or what authority the defendants agreed to exceed in the amount of oil that they would produce from the wells on said leases.

There are many ways that oil may be produced in violation of the laws of Texas and the rules and regulations of the Railroad Commission, and yet the oil so produced is not contraband oil within the definition of Congress. As an illustration, if oil is produced from a well without tubing having been placed therein; or where the stock tanks, in which the oil is stored, are not on the same lease upon which the well is situated; or if the flow lines from the well to the tanks are not connected directly with the tanks; or if a permit to drill the well at the location where it is drilled, has

not first been obtained; the production in all of such instances is unlawful production, yet it may not be in excess of the quota of production fixed by the Railroad Commission, and, therefore, does not come within the definition of contraband oil, and its transportation in interstate commerce is not prohibited. It therefore cannot be implied from the averment that the defendants agreed that they would produce oil in violation of the laws of Texas and the rules and regulations of the Railroad Commission, and in excess of that permitted to be produced from the wells on said leases, that they agreed to produce oil in excess of the production quota fixed by the regulations of the Railroad Commission under the laws of Texas. But if such could be implied, such implication could not be resorted to to supply an essential ingredient of the offense, which the defendants are sought to be charged with having conspired to commit. Brenner vs. United States, supra; United States vs. Hess, 124 U. S. 483, 31 L. Ed. 517.

In the last cited case, it is said:

> "No essential element of the crime can be omitted without destroying the whole pleading. The omission cannot be supplied by intendment or implication, and the charge must be made directly and not inferentially or by way of recital."

In United States vs. Eisenminger, 16 Fed. (2) 816, it is said:

> "It is, of course, horn book law that an indictment must charge each and every element of an

offense. United States vs. Standard Brewery, 251 U. S. 210, 64 L. Ed. 229. To be sufficient, it must show on its face that an offense has been committed. In a conspiracy indictment, it must appear that the defendants conspired, either to commit an offense against the United States, or to defraud the United States. With the latter, we are not here concerned. A conspiracy indictment must, therefore, show that the act agreed to be done embraced all the elements essential to constitute an offense against the United States. Obviously, a conspiracy indictment is not sufficient if it appears upon its face that one or more of the elements of an offense are wanting in the acts agreed to be done. See Clark's Crim. Proc. (2nd Edit.) p. 181."

It follows, therefore, that the averments of the first count are wholly insufficient to show that the defendants conspired to commit acts which would be in violation of sec. 715, Title 15, U. S. C. A., known as the Connally Act.

CONCLUSION

For the reasons above set forth, we respectfully submit that the judgment of the District Court in holding that the indictment states no offense under the provisions of Section 35 of the Criminal Code should be affirmed. And if the court considers our assignment as to the action of the lower court in holding that the first count states an offense of conspiracy to transport excessively produced oil in interstate commerce, then,

in that event, the judgment of the District Court in this respect be reversed with direction that the indictment be dismissed, and the defendants discharged.

Respectfully submitted,

F. W. FISCHER,
Tyler, Texas,
Attorney for Appellees.

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SUPREME COURT OF THE UNITED STATES.

No. 245.—October Term, 1940.

The United States of America, Appellant, *vs.* J. W. Gilliland, Ralph Gilliland, Fred A. Williams, et al.	Appeal from the District Court of the United States for the Eastern District of Texas.

[February 3, 1941.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

The District Court sustained a demurrer to ten counts of an indictment and the Government appeals. 18 U. S. C. 682.

There were eleven counts in the indictment, the first of which, a conspiracy count, the District Court found good. The other counts now before us were based on Section 35 of the Criminal Code. 18 U. S. C. 80.[1] Eight of these counts charged in substance that defendants had willfully caused to be made and used verified reports falsely and fraudulently stating the amount of petroleum produced from certain oil wells, and the other two counts made a similar charge with respect to verified reports as to the amount of petroleum received from certain producers.

The District Court held that these substantive counts did not state an offense under Section 35 of the Criminal Code as amended by the Act of June 18, 1934. 48 Stat. 996. The court plainly rested its decision upon its construction of the statute and hence direct appeal to this Court is properly brought. We are concerned only with the correctness of this construction and not with the mere interpretation of the indictment as a pleading. *United States* v. *Patten*, 226 U. S. 525, 535; *United States* v. *Birdsall*, 233 U. S. 223, 230; *United States* v. *Kapp*, 302 U. S. 214, 217; *United States* v. *Borden Co.*, 308 U. S. 188, 195.

Section 35, as amended, makes it a crime knowingly and willfully to "make or cause to be made any false or fraudulent statements or representations', or to "make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, af-

[1] See Act of April 4, 1938, c. 69, 52 Stat. 197.

fidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, in any matter within the jurisdiction of any department or agency of the United States''. The reports containing the alleged false and fraudulent statements in this instance were charged to have related ''to a matter within the jurisdiction of the Department of the Interior, the Secretary of the Interior, and the Federal Tender Board No. 1, Kilgore, Texas''.

By the Act of February 22, 1935, 49 Stat. 30, 31,[2] the so-called ''Hot Oil'' Act, the transportation in interstate commerce from any State of ''contraband oil'' produced therein was prohibited, such oil being that ''produced, transported, or withdrawn from storage'' in excess of the amounts permitted under the laws of the State or regulations duly made by its agencies. The President was authorized to prescribe regulations for the enforcement of the Act, including the requirement of ''reports, maps, affidavits, and other documents relating to the production, storage, refining, processing, transporting, or handling of petroleum and petroleum products''. Under this authority the President designated the Secretary of the Interior as his agent, and the latter promulgated regulations which the President approved. There was thus set up Federal Tender Board No. 1, to be located at Kilgore, Texas, for the East Texas Field and monthly reports on forms approved by the Secretary were required to be filed with the Board.[3]

If the provision of Section 35, under which the indictment is laid, be construed according to its literal and natural import, it is manifest that the statute covers the offenses charged in the substantive counts. The affidavits and reports, as described in the indictment, containing statements alleged to be false and fraudulent, were made and used in a matter within the jurisdiction of a department and agency of the United States. Nor can the statute be deemed to be invalid because of indefiniteness. The affidavits and reports required had been sufficiently described and the duty enjoined had been adequately defined. Any one presenting the required affidavits and reports to the Board set up under the pertinent regulations was suitably charged with notice of the consequence of knowingly and willfully including therein any false and fraudulent statements.

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[2] 15 U. S. C. 715-715d.

[3] Executive Orders No. 6979, issued February 28, 1935; No. 6980-B, Regulation XIV, approved March 1, 1935; No. 6980-C, approved March 1, 1935.

Defendant's contention, which the District Court sustained, is that the broad langugae of the statutory provision here involved should be restricted by construction so as to apply only to matters of a nature similar to those with which other provisions of Section 35 deal, "'such as claims against, rights to, or controversies about funds involved in 'operations of the Government' ", that is, to matters in which the Government has some financial or proprietary interest. This contention is sought to be supported by the doctrine of *ejusdem generis* and the construction given to Section 35 prior to the amendment of 1934, and by reference to the incongruity of the penalty prescribed for violation of Section 35 as contrasted with the penalty prescribed by the Act of February 22, 1935, to the enforcement of which the requirements in question were directed. Defendant also presents the contention, upon which the District Court did not pass, that the Act of February 22, 1935, was intended to cover the entire subject of the exclusion of "hot oil" from interstate commerce and consequently operated as a repeal of all other provisions dealing with that matter.

Before the amendment of 1934, Section 35, after referring to the presentation of claims against the government which were known to be false or fraudulent, provided:

"or whoever, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, or for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry: . . . shall be fined not more than $10,000 or imprisoned not more then ten years, or both".[4]

Distinguishing that provision from Section 37, the conspiracy section of the Criminal Code which by its terms extended broadly to every conspiracy "to defraud the United States in any manner or for any purpose",[5] this Court held that Section 35 which used

[4] 40 Stat. 1015.

[5] See Haas *v.* Henkel, 216 U. S. 462, 479; Hammerschmidt *v.* United States, 265 U. S. 182, 188.

the word "defrauding" in connection with "cheating and swindling" should be construed "as relating to the fraudulent causing of pecuniary or property loss" to the government. And that meaning was deemed to be emphasized by the context found in other provisions of Section 35. *United States* v. *Cohn*, 270 U. S. 339, 346, 347.

The Act of June 18, 1934,* amended Section 35 so that in place of the portion quoted above there were substituted these words:

"or whoever shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder; . . . shall be fined" etc.

The amendment eliminated the words "cheating and swindling" and broadened the provision so as to leave no adequate basis for the limited construction which had previously obtained. The statute was made to embrace false and fraudulent statements or representations where these were knowingly and willfully used in documents or affidavits "in any matter within the jurisdiction of any department or agency of the United States". In this, there was no restriction to cases involving pecuniary or property loss to the government. The amendment indicated the congressional intent to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described. We see no reason why this apparent intention should be frustrated by construction.

The rule of *ejusdem generis* is a familiar and useful one in interpreting words by the association in which they are found, but it gives no warrant for narrowing alternative provisions which the legislature has adopted with the purpose of affording added safeguards. "The rule of 'ejusdem generis' is applied as an aid in ascertaining the intent of the legislature, not to subvert it when ascertained". *Texas* v. *United States*, 292 U. S. 522, 534.

* 48 Stat. 996.

If the language of the amended section could be deemed ambiguous, the legislative history of the amendment would dispel any doubt as to the congressional purpose. Legislation had been sought by the Secretary of the Interior to aid the enforcement of laws relating to the functions of the Department of the Interior and, in particular, to the enforcement of regulations under Section 9(c) of the National Industrial Recovery Act of 1933[7] with respect to the transportation of "hot oil". The Secretary's effort was due, as he stated, to the lack of a law under which prosecutions might be had "for the presentation of false papers".[8] The bill which was passed by Congress, however, was amended in its final stages so as to require "intent to defraud the United States".[9] This bill was returned by the President without his approval for the reason that the offense as defined was covered by existing law which provided for more severe punishment than that proposed by the bill.[10] Another measure was then proposed by the Secretary of the Interior which would obviate these objections and accomplish the purpose of reaching the presentation of false papers in relation to "hot oil". A bill was then passed and approved which included, with other amendments of Section 35, the provision now before us, omitting the limiting words which had been deemed to make the former provision applicable only to cases where pecuniary or property loss to the government had been caused.[11] The report of the Judiciary Committee of the Senate stated that the amendment in question had been proposed by the Department of the Interior with the purpose "of reaching a large number of cases involving the shipment of 'hot' oil, where false papers are presented in connection therewith".[12]

The fact that the Secretary of the Interior was then seeking aid in the enforcement of Section 9(c) of the National Industrial Recovery Act, which this Court later found to be invalid (*Panama*

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[7] 48 Stat. 195, 200.

[8] See letter of the Secretary of the Interior to the Chairman of the Judiciary Committee of the Senate dated February 7, 1934. S. Rep. No. 288, 73d Cong., 2d sess.; 78 Cong. Rec., Pt. 3, p. 2859. See, also, H. Rep. No. 829, 73d Cong, 2d sess.

[9] 78 Cong. Rec., Pt. 4, pp. 3724, 3725; Pt. 6, p. 5746.

[10] 78 Cong. Rec., Pt. 6, p. 6778.

[11] 78 Cong. Rec., Pt. 10, pp. 11270, 11271; Pt. 11, p. 11513. Act of June 18, 1934, 48 Stat. 996.

[12] S. Rep. No. 1202, 73d Cong., 2d sess.

Refining Company v. *Ryan*, 293 U. S. 388), in no way affects the present application of the statute. Its provisions were not limited to the enforcement of Section 9(c) of the National Industrial Recovery Act but were enacted with appropriate breadth so that they at once applied to the presentation of affidavits, reports, etc., required by the subsequent Act of February 22, 1935, and the regulations duly prescribed thereunder.

In the light of the text of the Act of 1934, amending Section 35, and its legislative history, it is also clear that the fact that the penalty prescribed by Section 35 was greater than that fixed by the Act of February 22, 1935, has no significance in connection with the construction and application of the former. The matter of penalties lay within the discretion of Congress. Section 35 covered a variety of offenses and the penalties prescribed were maximum penalties which gave a range for judicial sentences according to the circumstances and gravity of particular violations.

Similarly lacking in merit is the contention that the Act of February 22, 1935, operated to repeal Section 35 as amended in 1934, so far as the latter applied to affidavits, documents, etc., presented in relation to "hot oil". There was no express repeal and there was no repugnancy in the subject matter of the two statutes which would justify an implication of repeal. The Act of 1934, with its provision as to false and fraudulent papers, has its place as a fitting complement to the Act of 1935 as well as to other statutes under which, in connection with the authorized action of governmental departments or agencies, the presentation of affidavits, documents, etc., is required. There is no indication of an intent to make the Act of 1935 a substitute for any part of the provision in Section 35. See *Posadas* v. *National City Bank*, 296 U. S. 497, 503, 504; *United States* v. *Borden Company*, 308 U. S. 188, 198, 199.

The judgment sustaining the demurrer to counts 2 to 11, inclusive, is reversed and the cause is remanded to the District Court for further proceedings in conformity with this opinion.

It is so ordered.

Mr. Justice MURPHY took no part in the consideration and decision of this case.